80-2121

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MAY 23 1981
ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

Edward Dean Martin,

Petitioner

v.

The State of Georgia,

Respondent

Petition For Writ of Certiorari to

The Court of Appeals For

The State of Georgia

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QUESTION PRESENTED FOR REVIEW

IS FUNDAMENTAL FAIRNESS VIOLATED WHEN A DEFENDANT IN A CRIMINAL MATTER ON TRIAL FOR HIS LIBERTY IS DENIED THE OPPORTUNITY TO HAVE AN EXPERT OF HIS CHOOSING, BOUND BY APPROPRIATE SAFEGUARDS IMPOSED BY THE COURT, EXAMINE PIECES OF CRITICAL EVIDENCE SEIZED AND HELD BY THE STATE WHOSE NATURE IS SUBJECT TO VARYING EXPERT OPINION WHEN THE STATE REFUSES TO CONDUCT COMPARISON TESTS ON THE EVIDENCE SEIZED AND HELD ? (Barnard v. Henderson, 514 Fed. Reporter, 2d Series, 287.)

PARTIES TO THE PROCEEDING

The parties to the proceeding are : Edward Dean Martin; and (2) The State of Georgia.

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OPINION BELOW

THE OPINION OF THE COURT OF APPEALS OF GEORGIA AFFIRMING THE DENIAL OF DEFENDANT'S MOTION TO TEST AND INSPECT AND THE DENIAL OF PETITIONER'S WRIT OF CERTIORARI BY THE SUPREME COURT OF GEORGIA ARE REPODUCED AS APPENDIX A AND B HERETO.

JURISDICTION

THE OPINION AND ORDER APPEALED FROM WAS FILED FEBRURARY 2, 1981. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of

the laws."

The Fifth Amendment to the Constitution of the United States provides:

> " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Miltia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

When the original trial was coming on before the court in August 1978, the petitioner filed and proceeded with a motion to be allowed to test, examine, and make comparisons on certain evidence seized by the state, to wit: sperm

samples and grease samples alleged to have been taken from the alleged victim. (R-99).

The respondent contended that such tests, examinations, and comparisons should not be allowed. The court agreed. (T-14), (T-15).

The petitioner again renewed and refiled his motion to be allowed independent tests, examination, and comparisons on April 16, 1980. (R99-102). The text of this motion disclosed:

1. that the respondent held a swab that was taken off the alleged victim and that said swab allegedly contained a sperm sample. (R-99);

2. that independent tests, examination, and comparison test of the sperm held by the respondent could exclude the petitioner as being the

person who was alleged to have had intercourse with the alleged victim at the time in question. (R-49);

3. that the respondent had refused to make the requested comparison tests and had for more than eighteen months refused to permit petitioner to examine or have independent experts examine and conduct such tests. (R-99);

4. that such tests, examinations, and comparisons could be conducted in three to four days. (R-99; and

5. that the petitioner should be allowed to conduct an independent examination and comparison tests with an expert of his

own choosing in regard to the grease smudges found on the alleged victim's clothing and vehicle. (R-100).

That on April 23, 1980 a hearing was conducted in the court below in regard to petitioner's independent examination and comparison test motion. (T-1). During the course of said hearing, the following facts were established, to wit:

1. that the respondent was holding the sperm sample taken off the alleged victim. (T-7);
2. that a comparison and examination tests of the nature sought by petitioner was scientifically recognized. (T-7);
3. that the comparison tests sought would be exculpatory of the petitioner if the results of

said tests were negative toward petitioner. (T-8);

4. That there was nothing at that point to identify the grease or the sperm sample held by the State as having come from any particular person. (T-10);

5. That the petitioner was waiving any rights that he had under the law prohibiting a forced extraction of a sperm sample from him and asking the state to make the subject test or in the alternative provide petitioner with the opportunity to have such a test conducted. (T-12);

6. That a serum analysis and comparison of the type requested could exclude the petitioner as the guilty party. (T-13); and

7. That the taking of sperm by the respondent from the alleged victim shortly after the occurrence in question was a fact of corroboration intended to be relied upon by the respondent in proving the charge of rape against petitioner. (T-16).

Upon the trial of the case at bar in the court below, Roger Parian was qualified as an expert witness by the respondent and through his testimony established the following facts, to wit:

1. that said witness did in fact find sperm on the microscope slide given to him by the G. B. I. (T-200);

2. that the above mentioned sperm sample came from the rape kit that the G. B. I. had in

fact used in its investigation of the occurrence in question. (T-197);

3. that the witness was a micro-analyst and was the director of the Savannah, Georgia Branch of the State Crime Lab. (T-206);

4. that it was possible to determine the blood type of an individual from their seminal fluid and that was why swabs were included in the standard kit used by the G. B. I. (T-206);

5. that a comparison test of the kind under discussion could eliminate a person as a defendant through the blood typing of the seminal fluid. (T-206), (T-207);

6. that there was no evidence as to who produced the subject

sperm sample. (T-211); and

7. that the subject sperm sample being held by the respondent came from the vagina of the alleged victim. (T-212).

The respondent refused to conduct any comparison tests (Identification tests) on the sperm samples or on the grease and refused to allow the petitioner to conduct such tests. The trial court agreed with the state.

REASONS FOR GRANTING WRIT

The decision below significantly undercut petitioner's Fifth Amendment right in that same deprieved petitioner of his liberty without due process of law and raises an important constitutional question, to-wit: Did the failure of the court below to permit petitioner prior to trial to have an expert of his

own choosing examine critical pieces of evidence which allegedly came from the person and clothing of petitioner so that counsel for petitioner could prepare himself to cross examine the respondent's expert and so that petitioner could exculpate himself in regard to said items violate petitioner's right to a fair trial as guaranteed by the United States Constitution?

To work effectively, it is important that society's criminal process satisfy the appearance of justice and be above reproach; also, it must be beyond the suspicion of reproach.

To satisy this requirment, the State should not refuse to permit one such as petitioner to test and examine physical items of evidence if said items are in fact what they purport to be and

the witness for the State is in fact what he purports to be and can stand behind his work and resist any contrary findings that may be found by an independent expert not on the State's pay roll. In commenting on the standard to be used in evaluating such a circumstance, the federal judiciary stated in the case of Ruiz v. Cady, 635 Fed. Reporter, 2d Series, 587, to-wit:

> "..formulating the applicable standard is not as important as recognizing that the omission must be evaluated in the context of the entire record because if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Since the respondent did in fact use the critical pieces of evidence against petitioner and did in fact produce an expert to testify that said

items were what they in fact purported to be and since petitioner's counsel was not an expert on the subject of either, it is submitted that said critical portion of the respondent's case amounted to trial by ambush and denied petitioner effective assistence of counsel at a critical stage of the proceedings. Commenting on trial by ambush, the federal judiciary stated in U.S. v. Cook, 608 F. 2d, 1175:

> " Trial by ambush may produce good ancedotes at bar conventions, but tends to be counter-productive in terms of judicial economy."

Petitioner alleged below that indepent test and examination of the sperm and grease samples held by the respondent could exclude him as the person who was alleged to have had intercourse with the alleged victim. The respondent's refusal to permit petitioner to examine

and test said items the results of which could have been material on the issues of identity and guilt constituted a supression of the evidence. In Brady v. Maryland, 373 U.S. 83, 10 LEd 215, 83 Supreme Court, 1194, and Giglio v. United States, 405 U.S. 150, 31 LED 104, 92 St. Ct., 763 this court held:

> " Suppression of evidence by the prosecution is a violation of the defendant's due process rights under the 14th Amendment of the United States Constitution....The evidence is material if it is of sufficient significance to result in the denial of the defendant's right to a fair trial."

The Supreme Court of Georgia stated in its written opinion issued in the case of Emmett v. State, 243 Ga., 554:

> " A defendant in a criminal matter had a right to have a person of his own choosing examine items of physical evidence in order to properly prepare his de-

fense."

It legally and logically follows from the ruling in the Emmett case that examination of items of physical evidence being held by the State includes testing of that evidence. Petitioner is prepared to support this premise upon brief and show by example that in many instances, such as products liability cases conducted on the civil side of the court, the manufacturer is given an opportunity to inspect and test the alleged defective items and that in bastardy proceedings blood test are a common occurrence.

It is submitted that petitioner and his counsel could look at a sperm sample all day and not know what he was looking at and by the same token look at grease smudges all day and not know that they were different unless he possessed

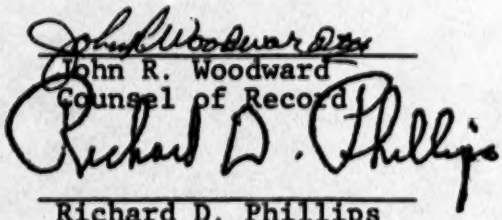
the necessary expert chemical knowledge to test same; therefore, petitioner will show upon brief, if permitted, that the failure of the respondent in situations, such as is being presented, to permit examination and testing of critical items of physical evidence creates an unacceptable gap in critical proceedings and permits the state to ambush a defendant at trial and then force a virtual default by said defendant in regard to such evidence. Additionally, the opportunity for a zealous prosecutor or state expert to stretch and magnify the importance or usefulness of such physical items upon trial necessitates the restoration of some form of checks and balances in this area of the case. In the matter at bar, if experts would have agreed, then no harm would have been done; however, if

different experts had varying opinions, then the petitioner was entitled to the benefit of that variance before an impartial jury composed of his peers.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectively prays that this Honorable Court issue a writ of certiorari to the Court of Appeals for the State of Georgia to review this cause for the reasons stated above, and that this Court reverse Petitioner's conviction.

Respectfully submitted,

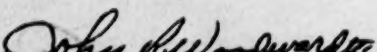


John R. Woodward
Counsel of Record

Richard D. Phillips
Counsel of Record

CERTIFICATE OF SERVICE

I, John R. Woodward, a member of the bar of this court and counsel of record for petitioner, hereby certify that on this 11th day of June, 1981, I served three copies of the foregoing "Petition for Writ of Certiorari to the Court of Appeals for the State of Georgia upon the Honorable Arthur Bolton, Attorney General, by mailing the same to him via United States mail, first class postage prepaid, from Ludowici, Georgia, addressed to him at 132 State Judicial Building, Atlanta, Georgia. 30334.



JOHN R. WOODWARD
Counsel of Record

APPENDIX A

OPINION OF ORIGINAL SUBMISSION

No. 60986

Court of Appeals for
the State of Georgia

February 2, 1981

CARLEY, Judge.

This case makes its second appearance before this court. Appellant's original conviction of aggravated assault and rape was reversed in Martin v. State, 151 Ga. App. 9 (258 SE2d 711) (1979). Upon retrial, appellant was again convicted of rape but found not guilty of aggravated assault. Appellant brings the instant appeal from his conviction of rape.

1. In his first enumeration of error appellant contends that the trial court "erred in not granting Appellant's motion to be allowed to conduct indepen-

dent tests and comparisons on the sperm samples and grease sample held by the state when the state refused to conduct said tests and comparisons." This contention has already been found to be without merit. Martin v. State, 151 Ga. App. 9, 13 (6), supra.

2. Appellant argues that the facts of this case require a finding that "the alleged offense of aggravated assault became merged and was included in the superior crime of rape," thereby necessitating a correlative finding that the state should not have been permitted to try appellant on both charges. Again, this issue has already been decided adversely to appellant. Martin v. State, 151 Ga. App. 9 (1), supra.

3. In his third and fourth enumerations of error appellant attacks

the verdict of the jury finding him guilty of rape, contending that the jury could not have properly found him guilty of rape and not guilty of aggravated assault.

The test as to whether verdicts are inconsistent has been stated as follows: " The determinative factor in such cases is whether the acquittal of one charge necessarily includes a finding against a fact that is essential to conviction for the other charge. If so, the evidence is then insufficient to support a verdict of guilty in the convicted charge." (Emphasis supplied.) Conroy v. State, 231 Ga. 472, 475 (202 SE 2d 398) (1973). Applying this standard to the facts of the case at bar, we find that the jury's verdict of guilty on the rape charge is not inconsistent

with its verdict of not guilty on the charge of aggravated assault. Even assuming that the jury found that appellant did not assault the victim with a tire jack, as had been alleged by the state, this finding in no way necessarily precluded the jury from finding each and every fact necessary to a verdict of guilty on the charge of rape. Appellant's third and fourth enumerations are consequently without merit.

4. In his final enumeration of error appellant complains that the trial court's charge on corroborating evidence as required under former Code Ann. § 26-2001 misled the jury into believing that the state was not required to prove appellant's guilt beyond a reasonable doubt. The portion of the charge to which appellant objects reads as follows:

" It is for the jury to determine whether the (testimony of the)female alleged to have been raped...has been so corroborated or not. It's not necessary that the corroborating evidence, if any, should be of itself sufficient to show the defendant guilty beyond a reasonable doubt from all of the evidence, that is of the female alleged to have been raed and the corroborating evidence, if any, all taken together." (Emphasis supplied.)

While the portion of the trial court's charge exerpted above cannot be deemed a model of clarity, we do not believe that it was so likely to confuse or mislead the jury concerning the state's burden of proof in this case that a new trial is required. Prior to the giving of the section of the charge

challenged by appellant, the jurors were fully and adequately instructed as to the "beyond a reasonable doubt" standard to be applied in the instant case in the following language:" Before you would be authorized to convict the defendant there must be other evidence independent of (the testimony of the prosecutrix) sufficient to connect the accused with the offense charged and all of the evidence taken together must convince your minds beyond a reasonable doubt of the guilt of the accused." (Emphasis supplied.) Thus, viewing the charge as a whole, we find that any error which may be ascribed to the trial court's language concerning corroborative evidence is, at most, harmless. See Bryant v. State, 229 Ga. 60 (3) (189 SE2d 435)(1972); Avery v. State,

141 Ga. App. 92 (4) (232 SE2d 618) (1977).

Judgment affirmed, Quillian, C. J. and Shulman, P. J., concur.

Decided Februrary 2, 1981-

cert. Applied For.

Rape. Long Superior Court. Before Judge Findley.

Richard D. Phillips, for Appellant.

Dupont K. Cheney, District Attorney, Kenneth R. Carswell, Assistant District Attorney, for appellee.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, March 4, 1981

Case No. 37367 Martin v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B.

WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

DEAR SIR: ATLANTA, March 24,1981

The motion for a reconsideration was denied today:

Case No. 37367. Martin v. State.

Yours Very Truly,

MRS. JOLINE B.

WILLIAMS, Clerk